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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 215

ARTHUR GOODWIN BILLINGS, PETITIONER

v.

KARL TRUESDELL, MAJOR GENERAL, UNITED STATES ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals is reported at 135 F. (2d) 505.[1] The opinion of the district court (R. 9–12)[2] is reported at 46 F. Supp. 663.

[1] No copy of the opinion of the circuit court of appeals has been paginated to the record.

[2] This reference is to the volume entitled "Transcript of Record" filed in the circuit court of appeals. The reference "Tr." used herein is to the separate volume consisting of the transcript of testimony taken in the district court.

JURISDICTION

The judgment of the circuit court of appeals was entered May 5, 1943. The petition for a writ of certiorari was filed July 30, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner was legally inducted into the Army of the United States, despite his refusal to subscribe to an oath of allegiance and obedience, and so became subject to military jurisdiction.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 12–17.

STATEMENT

Petitioner is thirty-two years of age (see Tr. 11). He graduated from the University of Kansas in 1933, spent two years at the University of Paris, served three years in the American Embassy in Moscow under Ambassadors Bullitt and Davies, traveled for four months in China and Japan in 1938, studied three years at Harvard University, receiving a master's degree and completing two-thirds of the work toward a doctorate, and became a member of the economics faculty of the University of Texas in 1941 (Tr. 14–15). He registered in the first draft registration in October

1940 with Local Board No. 1 of Ottawa County, Kansas, stating on his card at the time that he would never serve in the Army (Tr. 11). He was originally given a I–B classification because of defective eyesight, but was reclassified I–A in January 1942 (Tr. 12). The local board's rejection of his claim to being a conscientious objector was upheld on his appeal to the board of appeal (Tr. 12–14).

The local board notified him to report at its headquarters at Minneapolis, Kansas, at 10:45 A. M. on August 12, 1942, for the purpose of proceeding from there with a group to the induction center at Fort Leavenworth (Tr. 22–23). Petitioner, while at all times determined that he would never submit to induction into the military forces, desired to comply with all orders down to the point of actual induction, in order to avoid unnecessarily subjecting himself to civil penalties. He consulted draft officials in Texas and members of the law faculty of the University of Texas, and became convinced that he could not be inducted without subscribing to an oath or affirmation—that until he did so the military jurisdiction could not attach to him. (Tr. 11–22, 33–35; 47.) Upon receipt of the board's order to report he therefore proceeded to Kansas City in the hope that he would be rejected for defective eyesight, intending to comply with all orders down to the point of acceptance by the military authorities but

to refuse, if accepted, to submit to induction by the taking of an oath. His assumption was that in this way he would remain outside the military jurisdiction and suffer only civil penalties. At Kansas City he phoned the offices of the United States Attorney, United States Marshal, and the Federal Bureau of Investigation, inquiring as to where to surrender to the civil authorities for refusal to take the oath, in the event of his being accepted by the Army. (Tr. 42, 47–48.) He also called his local draft board and was told by its secretary that he would be reported delinquent for not appearing in Minneapolis, but she also directed him to join the group from Minneapolis at Victory Junction, Kansas, and to proceed with it from there to Fort Leavenworth, which he did (Tr. 22–24).

At Fort Leavenworth he reported with the group from Minneapolis, spent the night of August 12 in an Army barracks, was taken with the group to breakfast the next morning by a soldier in uniform, and then was given both physical and mental examinations and accepted for I–B noncombatant service (Tr. 24–27). Upon refusing to comply with an order to be fingerprinted if it should be deemed to involve induction into the Army, he was taken to Captain Milligan and Lieutenant Nemec, and was told by them that he was already in the Army (Tr. 28). They refused to allow him to turn himself over to the civil authori-

ties, or to release him unless he should agree not to do so, but did allow him to phone the offices of the United States Marshal and United States Attorney. At his request he was furnished by the latter's office with the names of several attorneys, one of whom (Mr. Reilly) he then retained by telephone to file a petition for a writ of habeas corpus on his behalf. Mr. Reilly asked the officers by telephone to delay the reading of the oath to petitioner for twenty-four hours, which they refused to do. The oath was then read to petitioner, but he refused to stand while it was being read or to subscribe to it. He was told that his refusal made no difference and that he was in the Army, and was then ordered to the guardhouse. (Tr. 28–31.)

Subsequent attempts by the military authorities and others to reason with and persuade petitioner to recognize and perform his duty proved unavailing (Tr. 49–52, 59). At the time of the filing of the return to the writ of habeas corpus (R. 5), he was held in confinement under charges of refusal to obey a military command to be fingerprinted (Tr. 36, 37, 46, R. 6).

In discharging the writ and remanding petitioner to respondent's custody, the district court held that petitioner was subject to military jurisdiction—that induction had occurred "by operation of law" upon his acceptance by the military authorities, and that the subsequent reading of the

oath was mere formality (R. 16). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of the district court was unanimously affirmed. While agreeing that a selectee "cannot avoid induction by refusing to take the oath," the circuit court of appeals was of the opinion that induction was completed "when the oath was read to petitioner and he was told that he was inducted into the Army."

ARGUMENT

In substance petitioner's argument that he was not legally inducted into the Army is based upon the proposition that the obligation imposed by the Selective Training and Service Act is not specifically enforceable and that punishment for civil disobedience is the extreme sanction whereby, under the Constitution, the United States may exercise its power to raise armies and resist aggression. As a constitutional proposition it is self-refuting.[3] The express power to levy war may not thus be legally nullified by a citizen's or citizenry's choice of prison in preference to war. It contemplates and exacts of the citizen more effective service than the suffering of civil punishment.

Petitioner's position is no stronger under the provisions of the Selective Training and Service Act and the regulations issued thereunder. The

[3] *Selective Draft Law Cases*, 245 U. S. 366, 378, 390.

statute (Appendix, *infra*, pp. 12–14) speaks in terms of compulsory military service. Thus, the declaration of Congressional policy in Section 1 (b) assumes the existence of obligations to be "shared generally in accordance with a fair and just system of selective compulsory military training and service." Section 3 (a) provides that specified male citizens and non-citizens "shall be *liable* for" such training and service (italics supplied) and authorizes the President "to select and induct" such persons into land and naval forces. And Section 4 (a) likewise speaks in terms of "the selection" of men "liable" for training and service. In providing that "no man, without his consent, shall be inducted for training and service under this Act after he has attained the forty-fifth anniversary of the day of his birth," Section 3 (a) clearly presupposes that actual induction may proceed without the selectee's own consent in other cases. It is his proving "acceptable to the land forces" that constitutes the basis of, and last condition precedent to, induction. This phrase appears twice in Section 3 (a). In the second instance of its use it is a requirement of universal application. In the first it is a part of a more limited requirement that "no citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this

Act unless he is acceptable to the land or naval forces." But this has been held to confer no right upon the alien to prevent or avoid induction, and to mean merely "that an enemy alien cannot be inducted, voluntarily or otherwise, unless he is acceptable to the land or naval forces."[4]

Proving "acceptable to the land or naval forces" obviously is no more for the citizen selectee's benefit than for the alien's, and an unequivocal indication by the military authorities, after examination, of their acceptance, is in either case tantamount to induction. The Selective Service Regulations use the word "induction" as the antithesis of "rejection"—in other words as meaning simply "acceptance" by the land or naval forces. 32 C. F. R., 1941 Supp., 633.8, Appendix, *infra*, pp. 15–16. In a case presenting the same issue as the one here, the court in *United States ex rel. Diamond* v. *Smith*, 47 F. Supp. 607, 609 (D.

[4] *United States ex rel. Cascone* v. *Smith*, 48 F. Supp. 842, 843 (D. Mass.). Army Regulations No. 615–500, Sec. II, Par. 7, a, (2), (b), 2, provide: "No enemy alien or subject of a country allied with the enemy will be accepted if he objects in writing to service in the Army." Cascone was inducted despite his statement in writing that "I am willing to serve in the armed forces of the United States, but cannot feel free to offer my services for combat duty." On habeas corpus the court held: "Whether or not this was adequate compliance is not open to this petitioner, since the regulations were provided for the benefit of the Army, and not to detract from the Congressional authority. The petitioner's acceptability was properly determined, and he is properly in the armed forces of the United States."

Mass.), held that "if a man successfully passes the physical examination and is accepted by the Army for training and service, he is inducted into the Army whether he takes the oath administered to him or not." A proposition that subscription to an oath or affirmation is a condition precedent to completion of a procedure that by hypothesis is compulsory throughout, is self-contradictory. Neither the Selective Training and Service Act nor the Selective Service Regulations require that a selectee subscribe to an oath.[5] The oath requirement of Article 109 of the Articles of War (Appendix, *infra*, 16), which has been held applicable of its own force only to men who voluntarily enlist,[6] by its terms presupposes that the taker is already a soldier.[7] War Department Mobilization Regulation No. 1–7, Par. 13e (4) (*infra*, p. 17), expressly covers the contingency of a selectee's refusal to take the oath asked of him under this regulation. Applying the test of *Ver Mehren* v. *Sirmyer*, 36 F. (2d) 876, 881 (C. C. A. 8), relied on by petitioner (Pet. 8, 16–17), "all the steps prescribed by

[5] It is significant that the only requirement of an oath made by the Regulations is in the case of voluntary civilian personnel of the Selective Service System, 32 C. F. R., 1941 Supp., 602.4, 604.75 (a) (1), and of witnesses before the boards, 32 C. F. R., 1941 Supp., 603.57.

[6] *Franke* v. *Murray*, 248 Fed. 865, 868–869 (C. C. A. 8).

[7] See *United States ex rel. Diamond* v. *Smith*, 47 F. Supp. 607, 609 (D. Mass.): "The taking of the oath would seem to follow induction, not precede it."

statute, and by regulations having the force of law," having been strictly followed in the present case, petitioner therefore was legally inducted.

It follows that petitioner is subject to military jurisdiction. He is not being kept in confinement for any act committed prior to induction, but for his continuing refusal to obey a lawful military command to be fingerprinted. The exact moment at which, after he reported at the induction center, restraint was first placed upon his person is immaterial. A sufficient answer to his contention that he did not report for induction (Pet. 13), is that he reported at the induction center. Arriving there, he obviously did not remain free of the military power of restraint to prevent his leaving. To contend otherwise is to contend that in enacting a compulsory service law Congress did not mean what it said, but created instead a legal duty which a selectee may not be compelled to perform.[8]

[8] Petitioner's contention (Pet. 18–23) that the draft and appeal boards erred in denying him classification as a conscientious objector is not properly before this Court. No such contention was presented to either of the courts below and the evidence of record is an inadequate basis for determination of such an issue. For all that appears the action of the boards was based solely upon a determination of fact upon sufficient evidence and was therefore conclusive. *Bowles* v. *United States*, decided May 3, 1943, No. 589, October Term, 1942, rehearing denied, June 7, 1943. Indeed, petitioner conceded at the hearing in the district court that he had been given a full and fair hearing by the local board and the Department of Justice Hearing Office (Tr. 12–14).

CONCLUSION

No issue calling for review by this Court is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1943.

APPENDIX

The Selective Training and Service Act of 1940, as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; Aug. 18, 1941, c. 362, 55 Stat. 626; Dec. 20, 1941, c. 602, 55 Stat. 844; Nov. 13, 1942, c. 638, 56 Stat. 1018),* in pertinent part provides:

> SECTION 1. (b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service. (50 U. S. C. 301 (b).)
>
> * * * * *
>
> SEC. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States * * * who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: * * * *Provided further,* that no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces. The President is authorized from time to time * * * to select and induct into

* Amendments enacted after the facts of the present case arose in no way affect the pertinent provisions.

the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest: * * * *Provided further,* that no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: * * * *Provided further,* that no man, without his consent, shall be inducted for training and service under this Act after he has attained the forty-fifth anniversary of the day of his birth. (50 U. S. C., Supp. II, 303 (a).)

* * * * *

SEC. 4. (a) The selection of men for training and service under section 3 * * * shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted: * * *. (50 U. S. C., Supp. II, 304 (a).)

* * * * *

SEC. 10. (a) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act. (50 U. S. C. 310 (a) (1).)

* * * * *

SECTION 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under the laws in force prior to the enactment of this Act. * * * (50 U. S. C. 311.).

The Selective Service Regulations (32 C. F. R. 1941 Supp., 601.7 *et seq.*) in pertinent parts provide:

601.7. *Inducted man.*—An "inducted man" is a man who has become a member of the land or naval forces through the operation of the Selective Service System.

601.8. *Induction station.*—The term "induction station" refers to any camp, post, ship, or station at which selected men are received by the military authorities and, if found acceptable, are inducted into military service.

* * * * *

633.1. *Order to Report for Induction (Form 150).*—(a) Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in triplicate. * * *

* * * * *

633.2. *Appointment of leader and assistant leader.*—(a) After selecting the registrants who are to fill the call, the local board shall designate one selected man to be the leader of the group and one or more to be assistant leaders. * * *

* * * * *

633.6 *Procedure before delivery.*—(a) At the time and place designated for the selected men to report for delivery, the local board shall:

(1) Call the roll of selected men.

(2) Read and issue the appointment of the leader and assistant leaders.

(3) Turn over to the leader the transportation request or tickets, the meal and lodging requests, and the records for the induction station.

(4) Notify the leader of arrangements that have been made at the induction station for the reception of the selected men.

(5) Specifically order the selected men to obey the leader and assistant leaders.

(6) Specifically order the selected men to report to the induction station.

* * * * *

633.8. *Reception of selected men at the induction station and return of rejected men.*—In the manner and to the extent prescribed by regulations of the land or naval forces, the commanding officer of the induction station is required to have the

selected men met at the railroad station or bus terminal, transported to the induction station, and provided with food and lodging after their arrival and pending their induction or rejection. In the manner and to the extent prescribed by the regulations of the land or naval forces, the commanding officer of the induction station is required to provide transportation and subsistence for the return of the selected men who have been rejected.

633.9. *Induction.*—At the induction station, the selected men found acceptable will be inducted into the land or naval forces.

Article 109 of the Articles of War (41 Stat. 787, 809; 10 U. S. C. 1581) provides:

> At the time of his enlistment every soldier shall take the following oath or affirmation: "I, ----------, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War." This oath or affirmation may be taken before any officer.

The War Department Mobilization Regulations in pertinent part provide (M. R. 1–7, Par. 13e):

> Induction ceremony.—
>
> (1) All men successfully passing the physical examination will be immediately inducted into the Army. The induction will be performed by an officer in a short,

dignified ceremony in which the men are administered the oath, Article of War 109:

* * * * * *

(4) They will be informed that they are now members of the Army of the United States and given an explanation of the obligations and privileges. In the event of refusal to take the oath (or affirmation) of allegiance by a declarant alien or citizen he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States. * * *